FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947

No. 434

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

No. 435

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

CHRISTIE BENET,
Columbia, S. C.,

JEFF D. GRIFFITH,
Saluda, S. C.,

J. B. S. LYLES,
Columbia, S. C.,

Attorneys for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

Subject Index

TABLE OF CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1947

No. ------

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

No. ------

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Etta S. Asbell respectfully shows to the Court:

A. Summary Statement of the Matter Involved.

This is a petition for writs of certiorari directed to the United States Circuit Court of Appeals for the Fourth Cir-

cuit to review the judgments entered by it in two cases, the appeals in which were "combined and prosecuted together upon one and the same transcript of record," as provided in a consent order of the District Court filed February 10, 1947. This order is entitled in both cases and first recites that "The issues in the actions above entitled being substantially the same, the actions were tried together by direction of this Court, with the assent of counsel for the parties." Both cases were disposed of in one opinion which was filed in the court below on August 2, 1947 (R. 64). The judgments below were filed and entered August 2, 1947 (R. 68, 87). A petition for rehearing was filed in time (R. 69) and was denied in an order filed September 11, 1947 (R. 85). The mandate was sent to the district court on September 18, 1947 (R. 85).

The last paragraph of the stipulation of counsel, subject to the approval of this Court, provides:

> "It Is Further Stipulated and Agreed that petitioner may file one petition for the two writs of certiorari and that the same may be heard upon one and the same record, and that all further proceedings herein may be taken under the combined captions of the two cases upon one and the same record." (R. 89.)

The two suits were commenced in the Court of Common Pleas for Saluda County, South Carolina, on May 15, 1946, by the same attorneys for plaintiff. Both defendants were represented by the same attorneys. Both suits were removed to the United States District Court for the Western District of South Carolina, Greenwood Division, on the ground of diversity, based on the respective allegations that the defendants were corporations of other States. The two cases were tried together before District Judge George Bell Timmerman and a jury on December 12-13, 1946.

The complaint in the first suit contains two causes of action based, respectively, on the double indemnity provisions of two policies of life insurance issued by the Mutual Life Insurance Company on the life of Albert L. Asbell—one for $5,000.00, and the other for $2,000.00. The provisions of both policies, which are the usual ones and which are identical as applied to the admitted facts, stipulate that insurer will pay double indemnity "upon receipt of due proof that the insured died as a direct result of bodily injury effected solely through external, violent, and accidental means, independently and exclusively of all other causes, * * * and that such death occurred within 90 days after the date of such injury; provided that the Double Indemnity shall not be payable if death resulted * * * directly or indirectly from disease or bodily or mental infirmity." (R. 26-28.) Insurer had paid the ordinary death benefits provided for in both policies under a non-prejudice agreement.

Both complaints allege that insured suffered an accidental fall on December 6, 1945, and underwent the next day a major surgical operation under a general anesthetic, which was made necessary thereby, and died as a direct result of such bodily injuries on December 29, 1945. Plaintiff is the widow of insured and the beneficiary under both policies and the certificate.

The complaint against The Travelers Protective Association of America is predicated on a certificate of membership held by said Albert L. Asbell, of which plaintiff, his wife, is beneficiary, whereby and pursuant to its constitution said Association contracted to pay $5,000.00, if insured should "independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death * * *." (R. 28.)

The defense in both cases was based on the factual contention that insured was suffering from a disease of the heart or coronary arteries prior to and at the time of the accident on December 6, 1945, which contributed as an essential factor in his death on December 29, 1945, and the legal contention that this relieved defendants of liability under the insuring clauses above quoted and excepting clauses in the policies and the constitution, which had the same legal effect.

Defendants' factual contention was based primarily on the evidence of Dr. L. Emmet Madden, a physician specializing in internal medicine in Columbia, S. C., who testified on direct that insured was under his care in the Columbia Hospital from the 3rd to the 17th of January, 1942, and that he diagnosed insured's condition at that time as coronary thrombosis, based on an arteriosclerotic conditon or disease of the affected blood vessel in his heart (R. 15-16). On the other hand, plaintiff relied strongly on the cross and re-direct examination of Dr. Madden as compelling or justifying the reasonable inference that insured had completely recovered from this attack more than three and one-half years prior to the fall, and that the fall and its consequences were the sole cause of death. (R. 58-61 and letter at R. 24.) The evidence is discussed in the brief filed herewith.

Neither defendant contended, however, that the major operation, which was necessitated by the accident and took two hours and twenty minutes, or the general anesthetic under which it was performed—the shock of both of which contributed to the death—was effective under any of the excepting clauses to relieve either defendant of liability. The defense was limited to the contention that the alleged disease pre-existing the accidental fall was the basis of non-liability.

Plaintiff consistently contended that there was substantial evidence making three issues for the jury, and that a favorable finding by the jury on any one of these would and did support the verdicts for plaintiff—such three issues being: (1) Had insured ever suffered from heart disease or hardening of the arteries? (2) If so, had insured recovered therefrom prior to the accident? (3) If the disease existed at the time of the accident, did it contribute as an essential factor in the fatal result, or was it a mere condition? And as a material factual factor on all three issues, plaintiff contended in both courts below, and now contends, that there was substantial lay testimony, apart from the medical evidence, upon which the jury could reasonably conclude that the severe injuries received by insured in the fall, plus the shock of the major operation the following day, together caused the coronary occlusion or thrombosis that caused death.

Both defendants made motions for directed verdicts on the single ground above outlined (R. 4-5), which Judge Timmerman denied after hearing full arguments thereon (R. 5-6). The jury rendered verdicts for plaintiff—$7,731-.00 against Mutual and $5,246.67 against T. P. A.—representing the face of the policies and certificate, respectively, together with interest from the date that admittedly they should have been paid, if defendants were liable. Judgments were entered in favor of plaintiff on these verdicts (R. 3-4).

Defendants made appropriate motions for judgment *non obstante veredicto* under Rule 50(b) of the Federal Rules of Civil Procedure on the same ground of their motions to direct (R. 6). These were refused by Judge Timmerman, after argument by defendants' counsel, in identical orders filed January 22, 1947, in each of which he said: "I was of opinion, following extensive argument of the motion

to direct a verdict, that there were substantial conflicts in the evidence, making issues for the jury. These were submitted under a charge to which no exception was taken. I am still of that opinion." (R. 6-7.)

The double indemnity and excepting provisions of the two policies and the accident and excepting provisions of the certificate-constitution of the T. P. A. were construed and applied by the district judge according to the rule laid down by the court below in two cases which were tried in district courts in South Carolina, to wit, *Jefferson Standard Life Ins. Co. v. Lightsey* (CCA-4), 49 F. (2) 586, and *Life Ins. Co. of Virginia v. Rhodes* (CCA-4), 71 F. (2) 413. The court below affirmed judgments for plaintiffs in both cases and construed such provisions to mean that "a diseased condition of the insured, unless an essential factor in the fatal result, would not prevent a recovery under the policy in suit," having previously pointed out "the true distinction between a pre-existing condition of the insured and a cause of death." This rule was followed by Judge Timmerman in his charge, in the absence of any South Carolina decision construing similar provisions. No exception was taken to the charge. The result was that the only substantial question argued, considered and decided in both courts below was whether there was sufficient evidence to support the verdicts of the jury in favor of plaintiff. The Court of Appeals decided this question in the negative, reversed the judgments and remanded the cases to the District Court, with direction to enter judgments for defendants in accordance with Rule 50(b) of the Federal Rules of Civil Procedure.

B. Basis of the Court's Jurisdiction.

It is competent for this Court to require by certiorari that these causes be certified to it for determination pur-

suant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240(a) of the Judicial Code; 28 U. S. C. A. Section 347.

C. Questions Presented.

1. Whether the Circuit Court of Appeals denied trial by jury to petitioner, in violation of the Seventh Amendment of the Federal Constitution, in holding that there was no evidence which presented a substantial basis for the submission of the cases to the jury, in that said Court misconstrued the evidence of the two medical witnesses which it emphasized, and disregarded substantial conflicts in such evidence, and in so doing failed to give effect to the rule laid down by this Court in *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525?

2. Whether the Circuit Court of Appeals erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants' contention, although these were in substantial conflict, and although there was substantial lay testimony which reasonably justified the verdicts; and whether, in this respect, the decision below is in direct conflict with:

(a) The decision of this Court in the *Tennant case, supra*, as well as those in *Head v. Hargrave*, 105 U. S. 45, 47-49, 26 L. Ed. 1028, and The Conqueror, 166 U. S. 110, 132, 41 L. Ed. 937, 947;

(b) The decisions of the Circuit Court of Appeals in the 1st Circuit—*Aetna Life Ins. Co. v. Allen*, 32 F. (2) 490; in the 7th Circuit—*Coyner v. U. S.* 103 F. (2) 629, 633; and in the 10th Circuit—*U. S. v. Gower*, 50 F. (2) 370, 371;

(c) The two former decisions in the 4th Circuit already referred to (*Jefferson Standard Life Ins. Co. v. Lightsey*, 49 F. (2) 586, and *Life Ins. Co. of Va. v. Rhodes*,

71 F. (2) 413), as well as *U. S. v. Taylor,* 110 F. (2) 132, wherein the *Gower case* was approved and followed on the merits; and

(d) Decisions of the Supreme Court of South Carolina, which furnish good precedent for a holding that the evidence on the trial of these cases was sufficient to make a jury issue as to whether the fall, plus the shock of the operation, was sufficient to cause the thrombosis that caused death. *Buggs v. U. S. Rubber Co.,* 201 S. C. 281, 22 S. E. (2) 881, and *Westbury v. Heslep & Thomason Co.,* 199 S. C. 124, 18 S. E. (2) 668.

D. Reasons relied on for the allowance of the writ.

1. In order that trial by jury may be preserved as intended by the Seventh Amendment, it is important that this Court should determine whether a Circuit Court of Appeals has violated the letter and spirit of the rule as to the sufficiency of the evidence so recently and positively stated by this Court in the *Tennant case,* 321 U. S. 29, 35. This Court, having there emphasized that all contradictions and inferences, as well as all questions of credibility of witnesses, are for the jury, added "That (jury) conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

2. It is important that this Court should determine whether a Circuit Court of Appeals has violated the well-established subsidiary rule as to the sufficiency of the evidence, in respect of opinions of physicians or medical experts, which is stated in *United States v. Gower,* a war risk

total disability case, C. C. A. 10th, 50 F. (2d) 370, 371, in this way:

> "• • • Moreover, expert testimony is only an aid to the solution of the main issue. It cannot be arbitrarily ignored or indolently accepted, and after it has been considered by the jury, if they believe their own experience, observations and common knowledge, as applied to the facts in the case, will guide them to a solution and verdict, they have a right to follow their own convictions, thus reached, although in doing so their verdict may be contrary to the opinion evidence of experts on the subject. *United States Smelting Co. v. Parry* (C. C. A.), 166 F. 407, 411; *Head v. Hargrave,* 105 U. S. 45, 47-49, 26 L. Ed. 1028; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; Jones on Evidence (2nd Ed.), Sec. 1373. After consideration of the evidence in the record, both that of laymen and the attending physician, as to the soldier's ailments and their effects upon him physically and mentally, we cannot hold that the proof does not sustain the verdicts."

This is a restatement of the rule of The Conqueror, 166 U. S. 110, 133, 41 L. Ed. 937, 947, to wit:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses. (Citing authorities.)"

The court had previously quoted and approved the rule as stated in *Head v. Hargrave, supra,* 105 U. S. 45.

This rule was the basis of the six pertinent cases decided by the court below and the Supreme Court of South Carolina, which were cited and referred to in appellee's brief below, and is the basis of the decisions cited supra from this Court and from the Circuit Court of Appeals in

the 1st, 7th and 10th Circuits, as well as numerous and consistent decisions of the Supreme Court of South Carolina.

Petitioner respectfully submits that the court below violated these established rules in its decision of the question of the sufficiency of the evidence; and that substantial error appears from a mere reading of the opinion itself; but, if this be not so, that error will appear upon a mere reading of the simple evidence in the record.

Petitioner further submits that there has been much litigation of this kind in the federal courts and that there probably will be much more in the future because the large life insurance companies are usually foreign corporations of the several states and frequently deny liability under these double indemnity provisions and then remove the suits to the federal courts when the jurisdictional amount is involved. The question of the sufficiency of the evidence in such cases is a question of Federal practice that is not within the Erie Railroad doctrine and it is important that a decision of a Court of Appeals that seems entirely out of line with all other pertinent federal and state decisions should be reviewed and reversed, if this Court so concludes. This decision, if erroneous, will cause substantial confusion and error in the future, particularly in the Fourth Circuit.

Wherefore, petitioner prays for the allowance of writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in these causes, in order that they may be reviewed and determined by this Honorable Court; and that this Court hear both cases on one and the same record, reverse the judgments of the Circuit Court of Ap-

peals and direct that the judgments of the District Court in favor of plaintiff below be reinstated.

ETTA S. ASBELL,
Petitioner,

CHRISTIE BENET,
Columbia, S. C.,

JEFF D. GRIFFITH,
Saluda, S. C.,

J. B. S. LYLES,
Columbia, S. C.,

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

No. .....

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

REFERENCE TO REPORT OF OPINION BELOW

The decision of the District Court is not reported. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 163 F. (2) 121, advance sheet No. 1.

GROUNDS OF JURISDICTION

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Section 347.

STATEMENT OF THE CASE

A summary statement of the case is made in the petition filed herewith under the heading "A. SUMMARY STATEMENT OF THE MATTER INVOLVED," and leave to omit the same here is prayed, for brevity's sake.

ERRORS TO BE URGED

1. The court below erred in holding that there was no evidence which presented a substantial basis for the submission of the cases to the jury, in that said court misconstrued the evidence of the two medical witnesses which it emphasized and disregarded substantial conflicts in such evidence, and in so doing failed to give effect to the rule laid down by this Court in the *Tennant case,* 321 U. S. 29, 35.

2. The court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants' contention, although these were in substantial conflict, and although there was substantial lay testimony which reasonably supported the verdicts. And, in so holding, the decision below is in direct conflict with decisions of this Court, decisions of the Circuit Court of Appeals in the 1st, 7th and 10th Circuits, as well as with former decisions in the 4th Circuit itself, and also with a consistent line of decisions of the Supreme Court of South Carolina.

SUMMARY OF ARGUMENT

I. The court below violated the rule laid down in the *Tennant case,* 321 U. S. 29, 35.

II. The court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants, when the lay evidence alone was sufficient to support the verdicts.

STATEMENT OF THE EVIDENCE

Lay Testimony

Plaintiff offered three lay witnesses, in addition to herself.

Mr. Joe W. Jones and Postmaster L. T. Boatwright were eyewitnesses of the fall. Their testimony was practically identical and is summarized as follows:

About one o'clock on December 6, 1945, Mr. Asbell came out of the post office on the cement sidewalk in the town of Ridge Spring. Mr. Asbell was reading a letter that he was holding in both hands, with other mail under his arm. He stepped on a ripe banana peeling with his left foot and slipped between twelve and eighteen inches; his feet went up and he just fell with practically every pound of weight he had on his left side. He hit all the way on his left side and broke his glasses across their left side. Neither witness ever saw a man fall any harder. For a second or two Mr. Asbell didn't move, and the two witnesses ran and helped him up. The undertaker happened by in his car; they put Mr. Asbell in the car, which took him home. (This testimony was not contradicted, was not printed in either appendix below, and is not printed here. Reporter's Transcript, pp. 4-10, 12-13.)

Testimony of Mrs. Asbell

Mrs. Asbell called Dr. Brunson, who came promptly, gave insured a hypodermic, and advised Mrs. Asbell to take insured to Columbia at once to see Dr. Epting, an orthopedic surgeon, who advised an operation. Mrs. Asbell called in Dr. Madden, who agreed to the operation under a general anesthetic. The operation was performed the next morning; it took two hours and twenty minutes, and insured continued under the influence of the anesthesia for

the greater part of the day. (R. 41-42.) Mrs. Asbell brought insured home in an ambulance on December 13 and he was taken direct to his room. He never left his room (except once—as stated below) or was able to attend to his affairs, before his death on December 29, 1945. Insured was not himself at all as to his normal vigor and strength; he was in shock. (R. 41-44.)

When insured was first brought home following the fall Mrs. Asbell noted the terrible blackness and swelling which set in immediately—all of his left arm. On December 28 Mrs. Asbell took Mr. Asbell to Columbia pursuant to an engagement with Dr. Epting, who examined the wound and shortened the cast. Immediately thereafter she brought him home where on the next day he was taken ill about eleven o'clock and passed away about six p. m. (R. 44-45.)

Following his first stay at the Columbia Hospital, commencing January 3, 1942, Mr. Asbell came home on January 14, 1942. About two weeks later he suffered a minor attack of influenza or colitis, for which he was given a sulfa drug by Dr. Brunson. The sulfa drug reacted with unusual severity, and, at the suggestion of Dr. Brunson, Mr. Asbell was again taken to a hospital in Columbia (the Providence) so that Dr. Madden might see him. Insured stayed at the hospital six days on this second visit; he came home March 5, 1942 (R. 35-37). Dr. Madden agreed that this was an inconsequential illness from which insured promptly recovered completely (R. 16). These are the only two illnesses of consequence that insured suffered prior to the accident on December 6, 1945 (R. 37)—almost exactly three years and nine months later. He was 61 years old when he died. (R. 38.)

Mrs. Asbell testified in detail that during their entire married life of nearly thirty-two years, excepting only the

period from January 3 to March 5, 1942, and a short while thereafter, Mr. Asbell lived a most vigorous and active life. He conducted a general merchandise business—hardware, dry goods and groceries—occupying two adjacent storerooms, with a clerk in each store; he also sold building supplies and coal; and he personally bought and sold cotton. Mr. Asbell was also regularly employed by a fertilizer company in Savannah as a fertilizer salesman-collector, and regularly traveled seven counties, driving his own auto, selling and collecting; he was paid a salary of $150.00 a month and sometimes a bonus. He personally ran and supervised three farms—two adjacent, one four miles distant from the others—and personally visited all three regularly, usually daily, sometimes twice daily. Mr. Asbell was once the mayor of the town of Ridge Spring and was town clerk for fifteen or twenty years. He was for twenty-nine years a steward in the Methodist Church and for twenty-seven years superintendent of the Sunday School. He was actively interested in the church orphanage. He enjoyed swimming. (R. 32-35.)

Mrs. Asbell testified positively and reiterated that Mr. Asbell had engaged continuously in these various activities, both prior and subsequent to the period of January 3-March 5, 1942—that he resumed these activities soon after he returned home in 1942 and continued them until the accident. She testified further that for three years prior to his accident they had no servants and that Mr. Asbell added household duties and chores to his other activities; that he arose first in the morning and made fires in two stoves; that he then went out and fed and milked a cow, and attended to hogs that they kept regularly; then after breakfast he would leave on his business activities. (R. 37-40.)

Mrs. Asbell testified, further, that Mr. Asbell would lie down in the afternoon following his noonday meal, upon

her insistence; that he thought to rest awhile would better help him carry out his duties for the afternoon—that is, of course, when his business activities permitted. (R. 38-39.)

"Q. During those years after he had been in the hospital, state whether or not he ever complained of pains in his chest or pains in his arms. A. He never complained. Q. What about shortness of breath? A. He never had any shortness of breath. Q. What can you say about the way he slept at night? A. He slept all night long entirely and his breathing was as easy as any baby's." (R. 39.) In rebuttal, Mrs. Asbell testified that Mr. Asbell had not at any time suffered from high blood pressure. (R. 46.)

Mrs. Asbell was not cross examined with respect to any of her testimony as above. Her cross examination was limited to identification of the proof of death and the attending physician's certificate therein. (R. 46.)

Mrs. Asbell's testimony as to the activities of Mr. Asbell was corroborated in some details by both Mr. Jones and Mr. Boatwright, *supra,* and also as to some details by her brother, Mr. Julian H. Scarborough, president of the Farm Credit Administration, Federal Land Bank, and Production Credit Association in Columbia. But the testimony of these witnesses was merely cumulative, except that Mr. Scarborough on cross, after having testified as to Mr. Asbell's activities following the attack of January, 1942, and stating he had heard that Mr. Asbell wasn't well at that time, added his lay opinion "And when I heard about it and saw him after that and all, I just didn't believe that he had any heart trouble in 1942." (Reporter's Transcript, 23.)

As to the Medical Testimony

It will be necessary to quote portions of this testimony in our argument under Point I and we beg leave to state

and consider all the medical testimony there—in order to avoid repetition.

ARGUMENT

Point I

The Court below misconstrued the evidence and violated the rule laid down in the Tennant case—321 U. S. 29, 35.

The opinion refers to Dr. P. A. Brunson, of Ridge Spring, as "the family physician," and to Dr. L. Emmet Madden, of Columbia, as the doctor "who testified for defendants with respect to the heart attack in 1942."

1. The opinion asserts that Dr. Brunson stated in the death certificate that death was due to "coronary occlusion or thrombosis and accidental injury" and assumes that Dr. Brunson was referring to a thrombosis in 1942. (2nd paragraph, R. 65). This is a grievous misconstruction which permeates the whole consideration given the evidence by the court below, as indicated by the opinion. Dr. Brunson did make this statement in one of the death certificates, but he also stated therein and on each of the several occasions that he testified in this respect, as later shown, that the occlusion or thrombosis to which he referred was one resulting from the fall of December 6, 1945, and that occurred after the fall and immediately preceding death on December 29, 1945. In other words, Dr. Brunson always referred to a thrombosis in December, 1945, whereas Dr. Madden always referred to a thrombosis in January, 1942.

The first certificate is printed as Plaintiff's Exhibit No. 4 at R. 25. This is entitled "Medical Certificate of Death" and is a portion of the standard certificate of death required by a statute of South Carolina. It was identified

and introduced during the direct examination of Dr. Brunson at R. 54, and received in evidence without objection. The second of these certificates was a part of the proof of death and is printed as Defendants' Exhibit "A" at R. 26, entitled "Attending Physician's Certificate." This was identified during cross examination of plaintiff, who testified that it was filled out and signed by Dr. Brunson (R. 46). It was later received in evidence without objection. (Reporter's Transcript, 114—not printed.)

It seems clear that the court below quoted "coronary occlusion or thrombosis" from the first line of Dr. Brunson's answer to question 22 of Exhibit No. 4 (R. 25). We are unable to see how the court could fairly quote that line and fail to quote also or—as it apparently did—fail to consider the next and second line of this answer reading "Date of onset: 12-29-45." (R. 25.)

We are also unable to see how the court could fairly construe Exhibit No. 4 without giving effect, or at least consideration, to question-answer 23 therein, where Dr. Brunson stated in effect that the "death was due to external causes (violence)," to wit, the accident of 12-5-45. It is inconsequential that Dr. Brunson stated the date of the accident erroneously by one day (R. 25).

We are also unable to see how the court below could fairly construe these exhibits together, as they should be construed, without considering or giving effect to question-answer 7-D of Exhibit "A", wherein Dr. Brunson again stated in effect that the death resulted from a "cause other than disease," to wit, an accident—the fall in question—concluding this answer with "He did not recover from effects of injury." (R. 26.)

It is true that in its statement of facts appellants' brief below (page 5) referred to and quoted only from

question 22 of Exhibit No. 4 and made no reference to question-answer 23 of Exhibit No. 4 or to question-answer 7-D of Exhibit "A". But appellants' brief did state that "the date of onset, appearing therein, was '12-29-45,'" and at pages 19-20 of appellee's brief below this matter was explained fully and in detail, so that we cannot understand how the court came into such substantial confusion in this respect.

2. The opinion also states that "* * * All the medical witnesses agree * * * that the fall was not the sole cause of death but that the pre-existing heart condition was at least a contributing factor." (R. 66); and

"* * *, but when the testimony of each of these medical witnesses is read as a whole, it is perfectly clear that each of them held the opinion that in 1945 the deceased was afflicted with an abnormal heart condition * * *, so that both physicians came to the conclusion that the death was the result of the combined effects of both causes * * *;" (R. 66-67); and

"Other uncontradicted medical testimony shows" that the thrombosis of 1942 was "caused or accompanied by an arteriosclerotic condition which persists and gives rise to further attacks." (R. 65.)

A. Testimony of Dr. Brunson

Dr. Brunson testified four different times, as clearly as a witness could, based on his personal attendance on and examinations of insured during the period of time in question, that, in his (Dr. Brunson's) opinion, insured was free and clear of any disease of the heart or arteries prior to the fall on December 6, 1945; that the fall caused a thrombosis that occurred on December 29, 1945, and caused death on that day:

(a) On direct: "Q. He came back from Columbia the week after the fall. Did you look after him after that? A. Yes, sir. I saw him each day after that. Q. What condition was he in, Doctor? A. Mr. Asbell was quite weak. He was pale. And he was suffering from shock apparently. He didn't have his usual strength or his cheerfulness or ability to get up and about. He was confined to the bed most of the time. Q. You know whether or not he ever got out of the house at all after—A. No, sir. Not that I know of. He didn't get out of his room. Q. Mrs. Asbell said his meals were served in the room. A. That is correct. Q. Had a nurse there? A. Had a nurse, yes, sir. Q. And you saw him daily? A. Yes, sir. Q. During that time, Doctor, did Mr. Asbell exhibit any evidence of a heart trouble? A. Not that I could tell, sir. Q. Did you examine him for—A. I examined him every time I went there. Q. The testimony here is that he passed away on the afternoon of December 29. Were you present when he died? A. Not when he died. But I saw him four times that day and it happened that I was away just at the time he passed out. Q. In your opinion what was the cause of his death? A. He died from coronary occlusion was what I think he died from. Q. What was that? A. I think it was caused from the accident; the shock of the accident. Q. By the accident, you mean the fall? A. The fall, yes, sir." (R. 49.)

(b) On direct, the court asked Dr. Brunson what he meant by "coronary occlusion," and after he had explained this the examination proceeded: "By Mr. Benet: And in your opinion that was caused by the fall? A. That was caused as a result of the fall, yes, sir." (R. 50.)

(c) On cross: "Q. Did he or did he not, Doctor, have an attack of coronary thrombosis in the early part of 1942? A. Not to my personal knowledge, but the report was that he had it, yes, sir. Q. And you have no quarrel with that

diagnosis, have you? A. Well, no, sir. I don't know for sure what it was. I mean to say, from personal knowledge he didn't have it. But from the report I got he did have it." (R. 55.)

(d) On re-direct: "Q. Mr. Black has asked you about Dr. Madden's diagnosis when Mr. Asbell was in the hospital in January of '42. Did you ever agree with that diagnosis? Well, sir, I didn't know of it so I don't say things for a fact that I don't know myself. Q. Therefore, you didn't agree with that diagnosis? A. I didn't find anything the matter with his heart myself. Q. You examined him a number of times? A. Yes, sir. Q. Did you ever find anything wrong with his heart? A. No, sir; never. Q. Therefore all this hypothetical line of questioning is not applicable because he hadn't had any former attack of coronary thrombosis or any other heart trouble so far as your examination showed, had he? A. No, sir." (R. 57.)

3. Dr. Brunson had testified on cross expressly contrary to the theory of the court below that there was an arteriosclerotic condition which persisted and gave rise to further attacks, to wit: "Q. And, Doctor, once you have an attack of coronary thrombosis and that is followed by a recovery, I want you to state whether or not the patient can expect to have further attacks of coronary thrombosis because of a diseased condition that is present? A. They may have or they may not. They sometimes get entirely well from it. * * * Q. Isn't it true that those who survive inevitably they will have further attacks unless death from some other cause takes them off? A. Not always. Some of them never have it any more. Q. Is it true that there is present a diseased condition once you have had an attack of coronary thrombosis, that you have a diseased condition of the heart? A. A diseased condition of the heart? Q. Yes,

sir. A. No; the heart gets well. Often entirely well." (R. 53.)

4. The opinion picks out one answer of Dr. Brunson on cross, apart from its context, and, based on this alone, holds that "it is perfectly clear that" Dr. Brunson was of opinion that the heart condition existed early in 1942 and persisted and operated as one of the causes of the death in December, 1945. (R. 66.)

We quote this segment of Dr. Brunson's testimony, emphasizing the question and answer referred to: "A. All right, sir. If he had coronary thrombosis then in 1942, four years later he had another attack of coronary thrombosis, wouldn't you say, sir, that he had a condition present in his heart that would give rise to that second attack of coronary thrombosis? A. I don't think so; not under the circumstances that the death occurred. Q. What is that? A. Not under the circumstances in which his death occurred. Q. **Doctor, if he had had a perfectly normal heart, is it your opinion that he would have had an attack of coronary thrombosis at that time? A. No, sir.** Q. You don't think so, do you? A. No, sir. Q. **Go ahead.** A. **What I was going to say,** I know that he suffered from shock and weakness and a very severe disability during the time of his illness and I believe that that brought the attack on." (R. 55-56.)

Dr. Brunson was trying to make clear his opinion, consistently with what he had already said, that insured had a perfectly normal heart prior to and up to the moment of the fall, but that the trauma and shock incident to the fall and the operation had injured or weakened insured's heart and coronary arteries, so that at the time of his death, twenty-two days after the fall and operation, insured did not have a perfectly normal heart. But opposing counsel was thinking and talking faster than the diffident and elderly Dr. Brunson. The Court will note that, just follow-

ing the particular answer, opposing counsel, because of his innate courtesy, realized that he had not given Dr. Brunson time to complete his answer to the question and that, when time was given, Dr. Brunson completed the statement of his opinion, consistently with what he had said four times before. The jury appraised this situation which is not reflected by the cold type.

5. Dr. Brunson did not volunteer the testimony "that he had not disputed the diagnosis," of thrombosis by Dr. Madden in January, 1942, which seems to have made a substantial impression on the court below. (R. 66.) This testimony came in on cross, in this way: "Q. Did you consult with Dr. Madden? A. I got a report from Dr. Madden. Q. Did he give a diagnosis of coronary thrombosis? A. Yes, sir; he did. Q. And did you take any exception to that diagnosis? A. No, sir, I didn't." (R. 55.)

The jury was entitled to gain the impression from Dr. Brunson's appearance on the stand that he was an elderly and modest gentleman in declining health and not temperamentally disposed to combat or dispute. Such impression did not militate against his veracity or ability.

Later, on re-cross, counsel, doubtless seeking to show some duty to speak in this respect, asked Dr. Brunson if he had not sent Mr. Asbell to see Dr. Madden in 1942. Dr. Brunson answered "No, sir. He went there of his own accord." (R. 57.) Dr. Madden's report was later sent to Dr. Brunson because the latter was Mr. Asbell's family physician. But the record does not suggest that Dr. Brunson ever came under any duty to speak with reference to Dr. Madden's diagnosis prior to the trial of these cases; much less does it suggest that he ever came under a duty to **dispute** the diagnosis. Dr. Brunson has been for more than forty years a general practitioner in a country town. Dr.

Madden is a diagnostician in the relatively large City of Columbia. When Dr. Brunson received Dr. Madden's report in early 1942 should he have *sua sponte* written a letter to Dr. Madden disputing the diagnosis, or should he have told Mr. Asbell that Dr. Madden's diagnosis was wrong? Where, when and why should Dr. Brunson have originated the dispute? We know of no rule of morals or law imposing this duty; is there any rule of medical ethics that required this? If so, this is not within our knowledge. If it was the personal theory of the court below, we submit that such theory is not based on the record in this case and that it was erroneously given effect as evidence.

B. Testimony of Dr. Madden

Dr. Madden wrote a letter to a local officer of The Mutual Life Insurance Company, dated February 14, 1946, evidently incident to proof of death, which he readily admitted and confirmed in every detail under oath on cross examination (R. 59-61). This letter was admitted in evidence without objection as plaintiff's Exhibit No. 5 and is printed at R. 24. The jury had a right to take this letter as a fair summary of Dr. Madden's testimony, made by himself prior to the commencement of litigation. We respectfully but earnestly ask the Court to read this letter carefully.

Dr. Madden wrote this letter *sua sponte,* in the calm and reflective atmosphere of his own office. His choice of language—"recovered completely," "full activity," "free of symptoms," "was getting along fine," "a very serious fracture"—was deliberate. He chose the most positive language. He referred to the "possibility of a **second** infarction," not "of the revival or recurrence" of a previous one; he closed "the series of events * * * **must** be con-

sidered as the cause of this man's death." (Emphasis added.)

Dr. Madden had not, on his direct examination, given opposing counsel much, if any, support on their necessary theory that the thrombosis of January, 1942, was due to an arteriosclerotic condition which persisted and contributed as an essential factor in the death. On re-direct opposing counsel made another effort to secure testimony from Dr. Madden in support of this theory, but met with even less success, to wit:

> "Q. Doctor, if a man has one attack of coronary thrombosis, what have you to say to the likelihood of his having any further attacks? A. He is likely to have another; not necessarily so, though."
>
> * * *
>
> "Q. Then, Doctor, is the statement in the letter which Mr. Benet presented you with, in your opinion he would be alive today, is that to any extent based on surmise and conjecture? A. Well, I think it is, but it is further based on the fact that on November 14, 1945, I had checked him over in my office and he was getting along extremely well; fine." (R. 61.)

We earnestly submit that, under the rule of the *Tennant case*, it was entirely within the province of the jury to find, (a) from the testimony of Dr. Brunson, that Mr. Asbell had never suffered from any abnormal heart condition prior to the fall, or, (b) from the testimony of Dr. Madden, that if Mr. Asbell had suffered a heart attack in January, 1942, he had fully and entirely recovered therefrom long prior to the fall, and that such disease did not contribute as an essential factor in his death.

C. Other Medical Testimony

Defendants offered two other medical witnesses, Dr. A. B. Josey, who had never seen Mr. Asbell and who testi-

fied purely as an expert and entirely on a hypothetical basis, and Dr. Charles A. Epting, orthopedic surgeon who performed the operation following the fall. Both were from Columbia. And the court below must have had Dr. Josey's testimony primarily in mind, because Dr. Josey was the only witness who developed the theme adopted by the court —that the thrombosis of 1942 was caused or accompanied by an arteriosclerotic condition, which persisted and contributed as an essential factor in the death. Dr. Josey also testified that a fall cannot cause coronary thrombosis in the normal heart. (R. 19-22.)

Appellants printed in their Appendix excerpts from Dr. Josey's testimony covering the above points (R. 19-22) but did not print any portion of his cross examination, which is found in the Reporter's Transcript at pages 103-107. This will show that Dr. Josey found it impossible to synchronize his testimony with that of Dr. Brunson, and particularly with that of Dr. Madden. His testimony was predicated on the hypothesis that Dr. Madden's testimony was correct, and Dr. Madden had testified that Mr. Asbell had "recovered completely" as of January 17, 1942, etc. Dr. Josey was finally forced into the position where he said he didn't question the facts of Dr. Madden's letter, but "I question the interpretation. Q. You don't question the fact, but you question the interpretation. What do you mean? A. The interpretation of what he meant by complete recovery." (Reporter's Transcript 105.) This cross examination closed with the following:

> "Q. Don't you know that Dr. Madden said when he examined Mr. Asbell the last time on November 14, 1945, which was not quite a month before the accident —you recall what he said his condition was at that time? A. I do, yes, sir. Q. What did he say? A. He said it was excellent. Q. Is there any better rating than

excellent for a man's physical condition? A. (No answer.)" (Reporter's Transcript 107.)

Dr. Epting contributed little except to testify as to the operation on December 7, 1945, and to give his opinion: "From my experience the accident of the injury to his elbow was not sufficient to have caused death. Note that I am saying from my experience because I am basing that on many other cases similar to this one." (R. 23.)

This other medical testimony was in direct conflict with the testimony of Dr. Brunson and Dr. Madden, either or both, so that the jury was entitled to disregard it under the rule of the *Tennant case.*

In addition to that, the jury was entitled to disregard this testimony, as well as any other portion of the medical testimony under the rule stated by Judge Anderson in *Aetna Life Ins. Co. v. Allen* (C. C. A.—1st), 32 Fed. (2) 490, which case was cited with approval and quoted from in *Life Ins. Co. of Va. v. Rhodes, supra* (C. C. A.—4th), 71 Fed. (2) 413, 414.

We quote two extracts from Judge Anderson's opinion:

"* * * But we think the jury were, as already noted, at liberty to disregard the conflicting and highly speculative theories of the experts, and to conclude that the *causa causans* of the death was the accident, effecting its fatal result in undetermined ways. It cannot be denied that the processes of life and of death are still, in their essential nature, unfathomed mysteries; that health and sickness are phenomena, the causes of which frequently remain unknown. The jury knew that Dority was hurt and died; they were warranted in finding that the hurt was the cause of his death, without also finding that the theory of bacterial infection, as a link between the hurt and his death, was established.

* * *

> "* * * In one aspect every death is 'caused' by heart failure. But in most cases involving human rights the real question is: What caused the heart to fail? Insurance companies cannot avoid liability under their contracts by confusing, through the speculative theorizing of experts, cause, condition, and effect. * * *"—32 Fed. (2d) 493-494.

The first of these extracts was quoted with approval by Judge Northcutt in his opinion in the *Rhodes case,* all of which was pointed out in appellee's brief below. We submit that the opinion here shows that the court below went entirely *contra* to this well-established rule in the construction and effect that it gave to the medical testimony, particularly that of Dr. Brunson and Dr. Madden.

Point II

The Court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants, when the lay evidence alone was sufficient to support verdicts.

We submit that the jury was entitled to find from the lay testimony summarized *supra,* either taken alone, or taken in connection with the testimony of Drs. Brunson and Madden, either or both, that the injuries and shock resulting from the fall and the consequent operation were sufficient and did in fact cause the coronary occlusion or thrombosis that occurred on December 29, 1945, and which caused death on that day. The rule that the jury need not "indolently accept" the testimony of medical experts is quoted *supra* (in the petition) from *United States v. Gower* (C. C. A.—10th), 50 Fed. (2) 370, 371. That quotation shows that the rule is predicated in part on *Head v. Hargrave,* 105 U. S. 45, 47-49, 26 L. Ed. 1028, and The Conqueror, 166 U. S. 110, 133, 41 L. Ed. 937, 947. As the petition shows fur-

ther, this rule as laid down in the *Gouer case* has been cited and followed with approval in *Coyner v. U. S.* (C. C. A.—7th), 103 Fed. (2) 629, 633.

The latest and most complete statement of the rule that has come to our attention in any textbook is found in 32 C. J. S., p. 396, as follows:

> "Opinions of physicians or medical experts may constitute substantial evidence but the weight thereof is for the trier of the facts. Ordinarily an opinion is not conclusive even though uncontradicted unless it concerns a matter of science or specialized art of which a layman can have no knowledge. A medical opinion cannot stand when opposed to actual facts, physical laws, or matters of common knowledge. It is entitled to no value if it has no substantial basis or if it is based on an incorrect assumption of the facts."

We cited to the court below the following cases as judicial recognition of the rule that a jury in a case such as this is entitled to find, from evidence not as strong as that presented here, that trauma may cause a thrombosis that causes death. *Aetna Life Ins. Co. v. Allen, supra* (C. C. A.—1st), 32 Fed. (2) 490, and *Scanlan v. Metropolitan Life Ins. Co.* (C. C. A.—7th), 93 Fed. (2) 942; and two cases from the Supreme Court of South Carolina—*Westbury v. Heslep & Thomason Co.,* 199 S. C. 124, 18 S. E. (2d) 668, and *Buggs v. Rubber Co.,* 201 S. C. 281, 22 S. E. (2) 881.

Respectfully submitted,

CHRISTIE BENET,
Columbia, S. C.,
JEFF D. GRIFFITH,
Saluda, S. C.,
J. B. S. LYLES,
Columbia, S. C.,
Attorneys for Petitioner.

INDEX

INDEX OF CASES CITED

INDEX OF CASES CITED—(Continued)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 434

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, RESPONDENT

No. 435

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

JURISDICTION

It is respectfully submitted that this Honorable Court should not entertain the Petition herein for the following reasons:

1. The Circuit Court of Appeals properly ruled that it is the right and duty of the Trial Court to determine whether there is any evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." The Appellate Court properly applied such rule, and reached the only

reasonable conclusion. This is not violative of the Seventh Amendment of the Constitution.

2. The decision of the Circuit Court of Appeals does not furnish grounds for review on a writ of *certiorari* within the letter or spirit of Rule 38, Section 5, of the Rules of this Honorable Court.

STATEMENT

Respondents are in substantial agreement with the Statement supplied by Petitioner as "Summary Statement of the Matter Involved", but in a number of particulars, including the following, the Statement of Petitioner is deemed inaccurate and incomplete.

Such Statement (Petition, page 3) inverts the pertinent clause of the Constitution of the Travelers Protective Association, and omits the proviso. Correctly, these should read:

> "Whenever a Class A member in good standing shall through external, violent and accidental means, under the limitations and provisions of the Constitution and amendments thereto, receive bodily injuries which shall independently of all other causes, result in death within six months from the date of said accident, $5,000.00 shall be paid to the beneficiary named in the certificate of such deceased Class A member."
>
> * * * * *
>
> *Provided*: * * * "that the Association shall not be liable in case of death when caused wholly or in part by bodily or mental infirmity or disease."

The defense asserted in both cases was in substance that defendants were relieved of liability because disease or bodily infirmity **caused** or **contributed to** Mr. Asbell's death, which, accordingly, was not within the coverage of

the respective insuring clauses, and was also expressly excluded by their exceptions.

It is correct that respondents relied upon the testimony of Dr. Madden to prove the occurrence of Asbell's heart attacks of 1942 and 1945, because he was the physician in attendance who observed, diagnosed and treated this condition. But as establishing, beyond reasonable doubt, that the accident did not of itself produce injuries sufficient to cause death, and that death would have ensued only by reason of the pre-existing condition of Asbell's coronary arteries and heart, favorable to a further heart attack, respondents rely upon testimony given by Drs. Brunson, Epting, Josey, and Madden, as is hereinafter developed, and upon the documentary evidence (R. 24-26); certainly not upon the testimony of Dr. Madden alone.

Nor does the Summary Statement fully set forth (Petition, p. 4) the ground of Respondent's defense, here succinctly stated: "* * * the death of insured was caused or contributed to by disease, and was not attributable to accident, independently and exclusively of all other causes."

Respondents respectfully point to the record (R. 4 and 5) as establishing conclusively the grounds of their motions for directed verdicts. Petitioner's statement thereabout too narrowly relates them.

Neither Petitioner on the one hand nor Respondent on the other took exception to the Trial Judge's charge. In effect he construed the respective insuring provisions and exceptions as meaning what they clearly say. Reference is made to the Reporter's transcript for the charge in its entirety.

When, upon appeal by the Respondents here, as Appellants there, the Circuit Court sifted the evidence with

the scrupulous care reflected by its opinion (R. 64-67), it could find none sufficient to justify submission of the issue to the jury, and upon petition for rehearing, urging the errors Petitioner is again asserting, the Court adhered to its conclusion (R. 85).

It is the decision of that Court, painstakingly reached, and reconsidered, that Petitioner seeks to reverse.

SUMMARY OF ARGUMENT

I. Analysis and refutation of the Petition and supporting Brief.

II. Jurisdiction should not be entertained by this Honorable Court, because:

(1) The Circuit Court of Appeals properly examined the evidence and drew the only reasonable inference to be derived therefrom. Right to trial by jury was not thereby violated.

(2) The decision of the Circuit Court of Appeals does not furnish grounds for review on a writ of *certiorari.*

ARGUMENT

I

Analysis and Refutation of the Petition and Supporting Brief

Under "Questions Presented" the Petition sets forth in substance the following specifications of error by the Circuit Court of Appeals:

1. The Court misconstrued and disregarded substantial conflicts in the evidence.

2. The Court erred in according credence to the opinion of physicians in conflict with the decisions of:

(a) U. S. Supreme Court;

(b) Circuit Court of Appeals for the first, seventh, and tenth circuits;

(c) The Circuit Court of Appeals for the fourth circuit; and

(d) Certain cases pertaining to Workmen's Compensation decided by the South Carolina Supreme Court.

As to the first question, we say that the Court did not misconstrue the evidence of the medical witnesses as Petitioner would have this Court believe, and we reserve argument on this point in discussing Point 1 of Petitioner's Argument *infra*.

As to the second question, we say that despite the diversionary language employed by Petitioner, it is her basic contention that the Circuit Court of Appeals itself "indolently accepted" the opinion of the physicians; whereas, it is the Respondents' submission that the Circuit Court of Appeals properly accepted the opinion of physicians concerning "a matter of science or specialized art of which a layman can have no knowledge", and that, considering the testimony as a whole, there was no substantial conflict as to any material point, and the Court properly determined that only one reasonable inference could be drawn from the testimony.

As to the subdivisions of this section, it is the position of Respondents, as hereinafter set forth in detail, that the decision of the Circuit Court of Appeals is in entire harmony with:

(a) The decisions of this Court;

(b) The decisions of other circuits; and

(c) The decisions of this circuit.

The decisions of the South Carolina Supreme Court construing the Workmen's Compensation Act, relied upon by petitioner as controlling on the Circuit Court, have no application whatever, as an entirely different rule of liability is applicable in Workmen's Compensation cases than is established by the provisions of policy contracts, such as those here involved, and their interpretation by the Courts.

Evidence that was given in the cases last mentioned cannot supply the omission or lack of such testimony on the trial of the instant cases.

In opposition to the "reasons relied on for the allowance of the writ" by Petitioner, Respondents assert that the decision of the Circuit Court of Appeals herein presents no questions of national or judicial importance, that the opinion is free from error, and that the asseveration by Petitioner that the decision will cause confusion is without foundation.

As to Petitioner's Statement of the Evidence

Basically, we believe the essence of the testimony given by the lay witnesses, as detailed by Petitioner, can be very much condensed and summarized as follows:

Mr. Joe W. Jones and **Postmaster L. T. Boatwright:**

Insured had a hard fall.

Mrs. Asbell:

Insured was in the hospital from January 3, 1942, to January 14, 1942. He was active and vigorous at all other

times, slept well, did not complain, and did not suffer from high blood pressure.

Following the accident insured was operated under anesthetic for two hours and twenty minutes. A week later he was taken home, was not then in normal health and vigor, and appeared to be in shock.

After a trip to Columbia for the purpose of having the cast shortened, insured on the next day (December 29) was taken ill about eleven o'clock and died at six P. M.

Julian H. Scarborough:

"Just didn't believe that he (Mr. Asbell, interpolated) had any heart trouble in 1942."

Commenting now on the lay testimony, Petitioner submits that there is not even a scintilla of testimony contained therein creating an issue as to whether Mr. Asbell had heart trouble in 1942. It would approach absurdity for Petitioner to contend that Mr. Scarborough's statement that he did not believe Asbell had heart trouble in 1942 could create an issue on this point, when weighed against Dr. Madden's positive testimony that Mr. Asbell came under his care on January 3, 1942, at the Columbia Hospital, remaining there until January 17, and that "we made a diagnosis of coronary thrombosis on the history of the patient and the electrocardiogram and his course in the hospital" (R. 15).

Neither does the testimony of the lay witnesses in any wise establish that the fall of insured resulted in injuries sufficient to cause death in opposition to the testimony of Dr. Madden (R. 18, 19) and of Dr. Epting (R. 53), that the injuries received were not sufficient to cause death. These medical witnesses were not testifying hypothetically.

Mr. Asbell was under their care for treatment for the exact conditions concerning which they testified.

Finally, there is no scintilla of testimony given by any of the lay witnesses, we respectfully submit, in opposition to the testimony given by Dr. Madden, Dr. Josey, and Dr. Brunson, that coronary thrombosis was the cause of death, that this was a disease, and that if it was not the sole cause of death, it was at least a contributing cause (R. 15 and 18, R. 21-22, R. 10, 13 and 14).

If, as Petitioner contends, the Circuit Court of Appeals ignored the testimony of the lay witnesses as presenting no conflict with the material testimony touching the points at issue, then we cannot say too forcefully that the Circuit Court of Appeals was entirely right in so doing, as the testimony of lay witnesses should have been so ignored and does not detract in any way from Respondent's contention, unanimously adopted by the Court, that no reasonable inference could be drawn from the testimony other than that the death of insured was caused or contributed to by disease and was not attributable to accident, independently and exclusively of all other causes.

As to the Medical Testimony

Under Point 1 of Petitioner's argument she sets forth in quotation marks the references made by the C. C. A. to Dr. Brunson as the family physician and to Dr. Madden as the doctor "who testified for the defendants with respect to the heart attack in 1942." If the quotation marks are expressive of dissatisfaction of petitioner thereabout, it is perhaps not amiss to call attention to R. 47 where Dr. Brunson, at the suggestion of plaintiff's own counsel testified that he was the Asbell's family physician.

Likewise it may not be amiss to say that as to Dr. Madden the court also described him as "the physican who attended the deceased at the time of the heart attack in 1942, and examined him thereafter" and as "the physician who attended the deceased in 1942" (R. 66).

These things are *trivia*. However, they add to the proof of respondent's contention that petitioner is taking isolated bits of testimony, and seeking to predicate thereon grounds for reversal, when a panoramic view of the testimony as a whole will lead unerringly to the conclusion reached by the Circuit Court of Appeals.

Petitioner next charges that the appellate court "assumes that Dr. Brunson was referring to a thrombosis in 1942. * * * This was a grievous misconstruction which permeates the whole consideration given the evidence below * * *." We have read and re-read second paragraph, R. 65, to which petitioner points, and we cannot warp the clear language of the opinion into even a suggestion upholding this contention of petitioner. We say that the opinion simply does not make the assumption charged, and that it is not the appellate court which has been guilty of grievous misconstruction.

Again we say that it is simply not correct that "Dr. Madden always referred to a thrombosis in January, 1942". The record establishes his references to 1945 as well (R. 47, 48, 54.)

Our discussion of the documentary evidence will be included in the subdivisions which follow.

Testimony of Dr. Brunson

Let it be understood at the outset that Dr. Brunson did not attend Asbell during the heart attack of January,

1942, and did not examine him during that time. Therefore, Dr. Madden's positive testimony, that Asbell did have an attack of coronary thrombosis in 1942 and was under care therefor from January 3 to January 17 of that year and that the diagnosis was made on the history, the condition of the patient, the electrocardiogram and his course in the hospital, is not put in issue by anything Dr. Brunson did say, or could say. Dr. Brunson knew Asbell had gone to Dr. Madden because of pain in his chest, and Dr. Brunson took no exception to the diagnosis (R. 14, R. 11).

As the Circuit Court of Appeals remarked: "Certain portions of the testimony of * * * Drs. Brunson and Madden "when isolated from the rest of their evidence have some tendency to indicate that the deceased had no abnormal heart condition at the time of the accident in 1945" * * * but that the testimony read as a whole compelled the conclusion for which respondent contended.

Hence, petitioner can point to bits of testimony, general in their nature, which when isolated might have some slight tendency to establish issues, but when the full story is told, and the pertinent testimony is examined as a whole, only one reasonable inference can be drawn.

Thus it is with Dr. Brunson (R. 8, R. 9). Although he testified that he did not think that under the circumstances in which death occurred there was present in insured a condition giving rise to the second attack, he **immediately** retracted.

* * * * *

"Q. Doctor, if he had had a perfectly normal heart, is it your opinion that he would have had an attack of coronary thrombosis at that time?

A. No, sir.

Q. You don't think so, do you?

A. No, sir.

Q. Go ahead.

A. What I was going to say, I know that he suffered from shock and weakness and a very severe disability during the time of his illness and I believe that that brought the attack on.

Q. Now we are getting right where I want. You think then, if I understand you correctly, that he did have a condition there that was favorable to an onset of coronary thrombosis given the precipitate events of this accident and the treatment for it?

A. Yes, sir.

Q. And you stick by what you said in the death certificate that the principal cause was coronary thrombosis or occlusion?

A. Yes, sir.

Q. And that is given as the primary cause of death. So if it was not the primary cause of death, Doctor, at least the condition of his heart was certainly a contributory cause of death, was it not?

A. Oh, yes.

Q. So then, Doctor, is it correct, under what you have just said, is it not that this accident did not cause death without the contributing or primary condition of his heart which took him off, that is correct?

A. The two went together.

Q. In other words, the accident all by itself did not cause it without the contributing disease, isn't that correct?

A. I think the accident brought on—In my opinion this accident brought on the attack.

Q. We have got that very clearly in the record. I want to know if you don't say now, what you have in substance just said, that the accident of itself did not exclusively of all other causes cause death but it combined and concurred with or was abetted by his diseased heart?

A. I believe they both were there, yes, sir. (R. 58-65.)"

Further in the death certificate (R. 25) he gave as the principal cause of death "Coronary occlusion or thrombosis".

He gave as a **contributing** cause **not related to the principal cause** the broken arm.

Respondents submit that no reasonable construction can be placed on the answer to question 23 of the death certificate, except to refer it to the "contributing" cause immediately preceding.

This not only accords with the subject-matter of the certificate, and the testimony of Dr. Brunson himself, excerpted above, but with the further certificate of Dr. Brunson comprising Defendant's Exhibit "A" giving the principal cause of death as "Heart attack. Probably coronary occlusion," and **contributory** causes, the fall and fractures. These answers establish non-liability on the part of respondents. Answer 7C (R. 26) removes any lingering doubt, could a doubt possibly remain. The question and answer:

> "7C. Was death due directly or indirectly to disease? If so, state disease: Coronary occlusion or thrombosis and accidental injuries."

Doctor Brunson is firmly committed to the proposition that the **disease** of heart was the **principal** cause of death, and that the accident and accidental injuries were **contributing** causes. Even were the facts reversed so that the accidental injuries were the principal cause, and disease a contributory cause there would be no liability upon the respondents under their respective contracts (R. 26-28) and under the clear charge of the Trial Judge.

Thus, respondents say that petitioner mistakenly argues that Dr. Brunson's testimony, taken as a whole, supplies any issue. Not once did he flatly testify that the acci-

dental injuries independently and exclusively of all other causes produced death and death did not result directly or indirectly from disease or bodily infirmity. As has been demonstrated, his testimony is to the contrary.

Addressing our attention finally, under this point, to question and answer 7D, Exhibit A (R. 26), we submit this chronology:

> 7A—The principal cause of death was heart attack.
>
> 7B—A contributory cause of death was the fall and fractures.
>
> 7C—Death was due directly or indirectly to the disease of coronary occlusion or thrombosis and accidental injuries.
>
> 7D—"If" (death was due directly or indirectly, —interpolated to conform to the preceding question—) "from any cause other than disease, mark cause below and state medical and other facts connected therewith: Accident—Insured slipped and fell on pavement breaking ulna and radius of left arm. He did not recover from effect of injury."

Dr. Brunson had in 7B and 7C given accidental injuries as contributing causes of death. An answer to 7D was accordingly in order—but beyond question the answer refers to the contributory cause of death, not to the principal cause.

For petitioner to contend contrariwise is, we submit, a snatching at straws to add to a house of the same material.

Testimony of Dr. Madden

Petitioner argues that the letter of Dr. Madden (Exhibit 5, R. 24) creates an issue for the jury,—that it would justify a jury in finding that Asbell's heart disease did not contribute as an essential factor in his death.

Considering the letter in the light of Dr. Madden's testimony, no issue is presented. His testimony shows that Mr. Asbell had heart disease in January, 1942; that he had a continuing condition which had given rise to the heart attack; that this condition was a disease; that after the fall and operation Asbell developed pain in his chest and the possibility of a second infarction; and that following a trip by Mr. Asbell to the City of Columbia to have the cast changed, he developed a severe recurrence of symptoms and died the same day.

When the letter said: "Of course, the accident did not in itself cause death", and the other testimony is taken into account that the accident was not of iself sufficient to cause death, and that death was caused by coronary thrombosis, a disease, then is established as a matter of law, we respectfully submit, non-liability on behalf of the respondents.

As to Other Testimony

Under this head petitioner states that Dr. Josey was the only witness who developed the theme adopted by the court—that the thrombosis of 1942 was caused or accompanied by an arteriosclerotic condition which persisted and contributed as an essential factor in the death.

Compare this testimony of Dr. Brunson (R. 10):

"Q. Doctor, as a matter of fact, in virtually 100 per cent of all cases of coronary thrombosis or coronary occlusion you have a hardening of the artery, do you not, that is arteriosclerosis?

A. Yes, sir, I think you do.

Q. And when that artery hardens it tends to become rough, and make rough the interior surface of that vessel?

A. Yes, sir, it may do that.

Q. And when that occurs in the course of time the blood will clot on that roughened surface, will it not?

A. It does sometimes.

Q. And then that gives you in the typical case an attack of coronary thrombosis or coronary occlusion, that is correct, is it not?

A. Well, it may come that way, yes, sir.

Q. Isn't it an actual fact that in virtually all cases of coronary thrombosis there is present that condition of a hardened artery?

A. Well, sir, I wouldn't say it is in all cases but the probability—

Q. In many, many cases?

A. Yes, sir.

Q. A very large percentage of cases?

A. Yes, sir."

and R. 14:

"Q. And you stick by what you said in the death certificate that the principal cause was coronary thrombosis or occlusion?

A. The two went together."

Compare this testimony of Dr. Madden (R. 15):

"Q. Doctor, please define for us coronary thrombosis and state what condition gives rise to an attack of coronary thrombosis.

A. Coronary thrombosis is an occlusion of the coronary artery, one branch of the coronary arteries or smaller branches, due to the formation of a clot on the wall of the vessel occluding it, stopping that vessel up.

Q. What causes the formation of that clot?

A. It occurs on the basis of an arteriosclerotic condition; plaques of calcareous material, any sclerotic changes in the vessel wall.

Q. Are the vessels normally rough or smooth?

A. Normally the blood vessel is perfectly smooth; a very smooth, shiny endocardium.

Q. Does that permit the blood to flow smoothly by?

A. That is right.

Q. And when you have an arteriosclerotic condition what is the condition of the artery?

A. The wall may be roughened; may be what is known as atheromatus ulcer, which is a breakdown of the inner lining of the vessel where you have just calcareous material on the basis of the ulcer."

and R. 18:

"Q. Doctor, there has been introduced in evidence here a Standard Certificate of Death signed by Doctor Brunson. This of course is a certified copy and not the original, and in that I call attention to the cause of death as given there as coronary occlusion or thrombosis. From your knowledge of Mr. Asbell's history and from your observation and treatment of him, can you state whether or not you have formed an opinion as to the cause of death or can form an opinion as to the cause of death, or whether or not that is the same as given by Doctor Brunson?

A. I think so, sir. I think it will agree with his.

Q. Doctor, I will ask you now whether in your opinion there was any cause or connection between the first attack and the condition that obtained with regard to the coronary artery at the time of the second attack?

A. I think certainly, as I said, that coronary occlusion occurs on a diseased vessel. The thrombosis he had led to a myocardial infarction. That infarction healed—the scar tissue. And that was practically as strong as the heart muscle itself, perfectly well, healed lesion. However, there still was the blood vessel in his heart that was a result of arteriosclerotic process.

Q. An arteriosclerotic condition is a disease?

A. Yes."

It will be observed from the foregoing that Dr. Josey's testimony is corroborative of the testimony given by attending physicians. To say that his is the sole testimony touching the point here under discussion is to ignore the record.

Summarizing the medical evidence: All of the medical witnesses, including Dr. Brunson for the appellee, were agreed that (1) the insured was suffering from a disease of the heart at the time of the fall; (2) the fall did not cause death exclusively of all other causes and without the contributing or primary diseased condition of his heart; (3) the pre-existing heart disease caused or contributed in causing death (R. 13, 14, 18, 20, 53).

The Circuit Court of Appeals accordingly stated with complete accuracy that:

> "All the medical witnesses agree that if the deceased had not fallen, he would not have died; and that the fall was not the sole cause of death but that the pre-existing heart condition was at least a contributing factor."

and, as to testimony of Drs. Brunson and Madden, that:

> "• • • when the testimony of each of these medical men is read as a whole, it is perfectly clear that each of them held the opinion that in 1945 the deceased was afflicted with an abnormal heart condition which made him more susceptible than a person in normal health to another heart attack, and that in this instance, the defective heart condition was revived by the pain and shock of the fall, so that both physicians came to the conclusion that the death was the result of the combined effect of both causes."

As to Authorities cited by Petitioner

(a) Supreme Court Decisions:

Petitioner laid stress on the case of *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. There it was held simply that it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the

jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. In the instant case the Court did not do what the *Tennant case* says it must not do. On the contrary, and in the absence of substantial evidence in favor of Petitioner, the evidence supporting Respondents' position being uncontradicted, the Circuit Court of Appeals merely determined that there was only one reasonable inference to be drawn from the testimony.

In *Head v. Hargrave,* 105 U. S. 45, 26 L. Ed. 1028, this Court held that a jury was not bound by testimony of experts as to **value.** It said that other persons beside professional men have knowledge of the value of professional services; and that while great weight should be given to the opinions of those familiar with the subject, such opinions should be examined intelligently by the jury in the light of their own general knowledge, and should control only as they were found to be reasonable.

Similarly, in *The Conqueror,* 166 U. S. 110, 132, 17 S. Ct. 510, 41 L. Ed. 937, it was held that as to matters of **value** the jury was not bound by the testimony of experts, on the same theory attributing to the jury, as laymen, knowledge of the subject at issue. It cannot reasonably be said that there is any conflict between the decision in the instant case and the decisions of the Supreme Court cited by Petitioner. As we shall later develop, this Court accords the opinion of experts controlling effect when uncontradicted and when based on facts which sustain them.

(b) Cases from Other Circuits:

A few quotations will serve to illustrate the problem before the Court in *Aetna Life Insurance Company v. Allen* (C. C. A. 1), 32 Fed. (2d) 490:

"The main question before us is whether the insurance company was, on all the evidence, entitled to directed verdicts.

"The lengthy and conflicting views as to 'traumatic endocarditis,' 'traumatic neurosis,' 'ulcerated endocarditis,' 'rheumatic endocarditis,' 'neuritis,' 'psychic shock,' etc., in connection with Dority's progress toward death, may have seemed to the jury to bear little or no relation to the issue of fact submitted to them. * * * There was not even expert agreement as to bacteria being the means or immediate cause of the death. The defendant's leading expert, the medical examiner, testified:

" 'Then, September 12th to 14th started the new picture of the oedema, the swelling of the shoulder and of the hand; that represented, as I have tried to explain, either a delivery of toxins from a focus or a delivery of bacteria. I don't know which.

" 'X-Q. 57. Well, if it was a delivery of bacteria, in your opinion whether or not that was the same bacteria that caused the endocarditis?

" 'A. I am inclined to believe they were, if they were bacteria. On the other hand, I am inclined from recent work, showing the production of toxins by this group, to attribute it probably to the delivery of toxic products, rather than bacteria. The work with reference to this is confusing,' etc.'

"The weight (or lack of weight) of all this theorizing was for the jury."

With conflicting testimony as to the cause of death, one theory establishing coverage under the policy, and the other relieving the insurer, the Court properly held as it did.

It is difficult, if not impossible, to see how the decision in the instant case is at variance with the ruling in the *Allen case.*

In *U. S. v. Gower* (C. C. A. 10), 50 Fed. (2d) 370, the question at issue was whether Gower was totally and permanently disabled. This question is peculiarly one for the jury and tribunals throughout the land recognize that the opinions of physicians alone are not controlling thereabout but the testimony of lay witnesses must also be regarded. Thus it has frequently been held that the opinion of a physician is of no probative value if it is opposed to testimony showing what the claimant can or cannot do. In the *Gower case* the conflicts of testimony are all clearly developed in the opinion, and in fact the Court stated that a conclusion that Gower was not disabled, under the testimony, would be against the greater weight of the evidence.

Coyner v. U. S. (C. C. A. 7), 103 Fed. (2d) 629, also involved the question of whether the evidence of permanent and total disability was sufficient to sustain the verdict of the jury. The Court called attention to the conflicting testimony and also to the fact that determination of the question is dependent on the facts and circumstances of each particular case, citing *Lumbra v. United States,* 290 U. S. 551, 558, 54 S. Ct. 272, 78 L. Ed. 492. The statement was made in the opinion that medical testimony does not in itself decide the issue as to whether there was permanent disability

In the case of *Scanlan v. Metropolitan Life Ins. Co.* (C. C. A. 7), 93 Fed. (2d) 942, it appears that an accident is supposed to have caused the formation of a blood clot in decedent's leg and that this blood clot, in the opinion of the physician, broke; one portion being carried ultimately into the heart and thence to the lung. Two significant facts which were not in dispute, as pointed out by the Court, were that there was no thrombus in the varicose vein or that area before the accident, and that the injury must

have caused the thrombus to form in or near the varicose vein. Where such significant facts are not in dispute, a different rule of law is applicable than that which was given in the charge by the Trial Court in the instant case. Since no exceptions were taken to the Trial Court's charge in this regard, it was recognized by both parties as being correct and the law as charged has now become the law of the instant case.

(c) Cases from the Fourth Circuit:

It is submitted that there is no confusion or conflict created by the decision of the appellate court and the several decisions which it has rendered in other cases cited iin Petitioner's Brief.

In *Jefferson Standard Life Insurance Company v. Lighisey* (C. C. A. 4), 49 Fed. (2d) 586, we quote from Judge Soper's opinion two passages clearly indicating the issue of fact there presented:

> "A physician was called in on the day after the accident, and found evidence of a blow to the back of the patient's head, and came to the conclusion that he was suffering from a concussion; that the blow was sufficient to cause concussion and death, and was the direct and sole cause of death.
>
> • • • • •
>
> "It must be admitted that the evidence produced by the insurance company for the consideration of the jury made out a strong case tending to show that the death of the insured was not due solely to the accident; but on the contrary, there was the evidence of the plaintiff's physician which tended to show that the accident was the sole cause of death, and we are unable to say, after a consideration of the whole case, that only one reasonable inference, and that favorable to

the defendant's contention, could be drawn." (Pages 587, 588.)

Similarly, in *Life Ins. Co. of Va. v. Rhodes* (C. C. A. 4), 71 Fed. (2d) 413, the issue of fact was presented, in the words of Judge Northcott, by this conflict:

> "The contention on behalf of the defendant was that diabetes was a contributing cause of his death and that the septicemia resulting from the accident was not the sole cause. On the other hand, there was some evidence on the part of the plaintiff tending to show that the symptoms indicating diabetes were themselves the result of the septicemia caused by the accident. At the conclusion of the evidence, a motion was made on behalf of the defendant for a directed verdict, which motion; the trial judge overruled. The only question here is whether this action of the court below was error." (Page 414.)

In *U S. v. Taylor,* 110 Fed. (2d) 132, the question of total and permanent disability was involved, which as we have pointed out, is determinable by consideration of all evidence, each case resting for its conclusion upon its peculiar facts and circumstances. The Court, after reviewing the evidence, held that a verdict establishing total and permanent disability was warranted.

Surely Petitioner does not urge, merely because the Court in these several cases sifted their peculiar facts and found evidence warranting submission of the issues to the jury, whereas in the instant case the same procedure was adopted and under the facts no substantial evidence was found warranting a jury verdict, that the instant case conflicts with those in the first category.

(d) As to South Carolina Compensation Cases:

A rule of liability obtains with reference to South Carolina Workmen's Compensation cases different from the contractual liability assumed by the Respondents under their insuring agreements and as properly construed by the Trial Judge.

By rule of decision South Carolina Courts are commited in Workmen's Compensation cases, to the proposition that if an employee sustains an accident, arising out of and in the course of his employment, and such injury aggravates or "lightens up" the effects of an existing condition, then the employer becomes liable for payment of compensation for the entire disability, *Cole v. State Highway Department,* 190 S. C. 143, 2 S. E. (2d) 490; *Green v. Bennettsville,* 197 S. C. 313, 15 S. E. (2d) 334; *Westbury v. Heslep & Thomason Company,* 199 S. C. 124, 18 S. E. (2d) 668; *Buggs v. United States Rubber Company,* 201 S. C. 281, 22 S. E. (2d) 881.

Even so, we call attention to the evidence in the *Buggs case, supra,* given by a heart specialist to the effect that the **accidental injury caused thrombosis,** and that this was rare.

In the case of *Westbury v. Heslep & Thomason Company, supra,* a medical witness testified that: **"In his opinion the injury described by the witness as having been received by Mr. Westbury could cause his death."**

The Respondents urge that Petitioner cannot supply any deficiency of proof herein by reference to other cases where proof of a particular fact may have been adduced. The subject is not one of which the Court takes judicial cognizance.

II

Jurisdiction Should Not Be Entertained

(1) **The Circuit Court of Appeals properly examined the evidence and drew the only reasonable inferences to be derived therefrom. Right to trial by jury is not thereby violated.**

It is needless to add authorities to those cited by the Appellate Court supporting the rule that a scintilla of evidence is not enough to require the submission of an issue to the jury, and that there is a preliminary question for the judge, before evidence is left to a jury, whether there is any evidence upon which the jury can properly proceed to find a verdict. The statement of the rule was lifted from this Court's opinion in *Gunning v. Cooley,* 281 U. S., 90, 94, 50 S. Ct. 231, 74 L. Ed. 720, and is supported by *Improvement Company v. Munson,* 14 Wall. 442, 448; *Pleasants v. Fant,* 22 Wall. 116, 122. Attention was also called to *Galloway v. United States,* 319 U. S. 372, 389, 87 L. Ed. 1458, 63 S. Ct. 1077, rehearing denied, 320 U. S. 214, 87 L. Ed. 1851, 63 S. Ct. 1443; *Hartman v. Baltimore & Ohio R. Co.* (4 Cir.), 89 Fed. (2d) 425-426.

It cannot be doubted that this is the proper rule, and that it is not within the Erie Railroad doctrine, but is a matter of Federal practice.

We have hereinabove reviewed the evidence, and have fully demonstrated, we believe, that there was no substantial basis for submission of the case to the jury.

We have likewise demonstrated, we believe, in our review of Petitioner's authorities, that the opinions of **attending physicians, not contradicted,** and touching the diagnosis, condition and treatment of a patient, are con-

clusive. These are matters "of science or specialized art of which a layman can have no knowledge." (Petitioner's Supporting Brief, p. 33.)

The testimony of the physicians was not "opposed to actual facts." The presence of heart disease in 1942 and again in 1945 was detected by electrocardiogram. The several diagnoses were based thereon, and upon observation and examination of the patient.

The Seventh Amendment:

> "permits expert opinion to have the force of fact when based on facts which sustain it." *Galloway v. United States,* 63 S. Ct. 1443, 320 U. S. 214, 87 L. Ed. 1851.

The case just cited also recognizes and rules that the Seventh Amendment does not deprive federal courts of power to direct verdicts for insufficiency of evidence.

(2) **The decision of the Circuit Court of Appeals supplies no adequate grounds for review by certiorari.**

Although the petition makes plenary charges of conflict and confusion, it is Respondents' submission that these charges are without foundation.

Petitioner's rights under the Seventh Amendment have not been violated, under authority of the *Galloway case, supra.*

The *Tennant case,* as above reviewed, precludes speculation by the Court, when facts are present justifying a verdict.

The cases from other circuits, upon examination, are found to present different factual situations, warranting different conclusions and hence no conflict therewith is presented by the opinion here under attack.

Again, the decisions from the 4th Circuit are shown to be in harmony, for the Court in the *Lightsey* and *Rhodes cases, supra,* applied the same rule as here, and determined that under the facts peculiar to each of those cases, jury issues were presented.

Finally, it has been shown that the South Carolina Compensation Cases relate to a different basis or rule of liability than that for which the Respondents have contracted here, and hence are not of any value to Petitioner.

In the light of the foregoing a reading of rule 38 of the Supreme Court, and more particularly of Section 5(b) will lead to the conclusion that "special and important reasons" do not here exist for the granting of the writ of *certiorari.*

The decision, whether from the standpoint of result or precedent, is isolated, and is not of national or judicial significance. It is not probable that the facts will again be duplicated, and basically Petitioner is asking this Court to weigh the facts. Time and again this Court has ruled that granting of the writ is not warranted merely to review the evidence or inferences drawn from it. To cite a few instances:

General Talking Pictures Corporation v. Western Electric Company, Inc., 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. Ed. 1273;

United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925;

Southern Power Co. v. North Carolina Public Service Co. et al., 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413;

Houston Oil Company of Texas v. Cornelia G. Goodrich et al., 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

CONCLUSION

In conclusion Respondents urge that the decision of the Circuit Court of Appeals followed Constitutional and accepted procedure and arrived at the only reasonable conclusion authorized by the evidence; that the decision does not create conflicts or confusion, but clearly and correctly applies the law to the facts established by the evidence; and that accordingly the petition for writs of *certiorari* should be denied.

Respectfully submitted,

PINCKNEY L. CAIN,
S. AUGUSTUS BLACK,
THOMAS, CAIN & BLACK,

Attorneys for Respondents.

OF COUNSEL:

LOUIS W. DAWSON,
For Respondent, Mutual Life Insurance Company of New York.

MAURICE P. PHILLIPS,
For Respondent, Travelers Protective Association of America.